A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases

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For almost a half century, the topic of Congress's ability to restrict federal court jurisdiction has engaged the best and the brightest among federal courts scholars. Henry Hart's famous dialogue set the terms of the debate in 1953,[1] but the list of those who have written on the subject is a veritable who's who among constitutional law and federal courts professors.[2]

The issue truly relates to the very essence of separation of powers under the United States Constitution: What is the proper relationship

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1. *See* Henry M. Hart, Jr., *The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1402 (1953).

2. *See, e.g.*, Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and New Synthesis*, 124 U. PA. L. REV. 45 (1975); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

between Congress and the federal judiciary? There also is an important federalism dimension to the debate. Restricting federal court jurisdiction means that cases must be heard, if anywhere, in state courts. Is this an adequate substitute for federal judicial review, especially if the Supreme Court is not available to ensure compliance with federal law? If state courts can ignore federal law without any check by the Supreme Court, does this not undermine the Supremacy Clause of Article VI? Moreover, basic issues concerning due process are at stake, especially if no court is available to hear a matter.

Countless scholars have developed many different positions on the issue of Congress's ability to restrict federal jurisdiction. Some believe that the Constitution clearly authorizes Congress to control federal jurisdiction and that this is an appropriate political check on the judiciary.[3] Others contend that there are significant limits on Congress's ability to restrict federal court jurisdiction; they maintain that Congress cannot act with the purpose and effect of undermining constitutional rights and that due process requires a judicial forum.[4]

After decades of academic debate, the Court now is poised to decide the constitutional issue as a result of recent federal laws restricting federal court jurisdiction in immigration cases. Both the 1996 Antiterrorism and Effective Death Penalty Act[5] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[6] significantly restrict federal court jurisdiction over certain immigration matters.[7]

The Antiterrorism and Effective Death Penalty Act greatly restricts the ability of federal courts to review deportation orders. The Act provides: "Notwithstanding any other provision of law, no court

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3. *See, e.g.*, CHARLES L. BLACK, Jr., DECISION ACCORDING TO LAW 17-19, 37-39 (1981); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 134 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 917-22 (1984).

4. *See, e.g.*, Hart, *supra* note 1, at 1364-65; Sager, *supra* note 2, at 89; Tribe, *supra* note 2, at 142-46.

5. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

6. Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996).

7. For a discussion of these provisions and their constitutionality, see Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); and Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850 (1997).

shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered by [certain listed deportation provisions.]"[8] Additionally, the Act expressly deletes the prior provision in federal law that permitted habeas corpus review of claims by aliens who were held in custody pursuant to deportation orders.[9] The law thus appears to foreclose all judicial review of deportation orders.[10]

Congress further restricted judicial review in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This law repealed a long-standing provision that authorized judicial review in the circuit courts of appeals and guaranteed habeas corpus upon detention. Additionally, the Act limited review of removal orders directed at aliens by declaring that "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section."[11] The Act also limits court review of discretionary decisions by the Attorney General, stating that no court has jurisdiction to review such rulings by the Attorney General as cancellation of removal,[12] voluntary departure,[13] or adjustment of status.[14]

In 1999, in *Reno v. American-Arab Anti-Discrimination Committee*,[15] the Supreme Court interpreted a provision of the Illegal

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8. 8 U.S.C.A. § 1252(a)(2)(C) (West Supp. 1998) (repealing 8 U.S.C.A. § 1105a(a)(10) (West Supp. 1996)).

9. *See id.* § 1535(e)(2) (West Supp. 1997). The Act also provides that an alien convicted of an aggravated felony is to be "conclusively presumed" to be deportable. 8 U.S.C. § 1228(c) (Supp. II 1996). A petition for review or for habeas corpus on behalf of such an alien may only challenge whether the alien is, in fact, an alien. *See* 8 U.S.C.A. § 1252(e)(2)(A) (West Supp. 1998).

10. Lower courts generally have upheld the constitutionality of the restrictions found in the Antiterrorism and Effective Death Penalty Act. *See, e.g.*, Mansour v. INS, 123 F.3d 423 (6th Cir. 1997); Chow v. INS, 113 F.3d 659 (7th Cir. 1997); Yang v. INS, 109 F.3d 1185 (7th Cir. 1997).

11. 8 U.S.C.A. § 1252(b)(9) (West Supp. 1998).

12. *See id.* § 1252(a)(2)(B); *see also* 8 U.S.C. § 1229b (Supp. II 1996).

13. *See* 8 U.S.C.A. § 1252(a)(2)(B) (West Supp. 1998); *see also* 8 U.S.C. § 1229c (Supp. II 1996).

14. *See* 8 U.S.C.A. § 1252(a)(2)(B) (West Supp. 1998); *see also* 8 U.S.C. § 1229b (Supp. II 1996).

15. 119 S. Ct. 936 (1999). It should be disclosed that I co-authored an amicus brief filed in the Ninth Circuit in this case.

Immigration Reform and Immigrant Responsibility Act of 1996 as precluding federal court review of decisions by the Attorney General to "commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."[16] Although the decision contains little discussion of the constitutionality of jurisdictional restrictions, the Court upheld the validity of the provision.[17]

It is hardly surprising that the issue of jurisdiction-stripping is coming to the Supreme Court in the context of immigration law. The seminal article in the area, the famous dialogue written by Henry Hart, was in response to Supreme Court cases upholding the authority of emergency authorization for the President to exclude aliens without a hearing.[18] Hart wrote that the Court's decisions concerning judicial review of immigration proceedings were "one of the most impressive examples of the general point . . . and currently provides a testing crucible of basic principle."[19] Indeed, much of the dialogue discussed the constitutionality of limiting judicial review in immigration cases.[20]

Many Supreme Court cases since then also have involved the issue of the constitutionality of restricting judicial review in the immigration context. Cases such as *United States v. Mendoza-Lopez*,[21] *McNary v. Haitian Refugee Center, Inc.*,[22] *Reno v. Catholic Social Services*,[23] and *Reno v. American-Arab Anti-Discrimination Committee*,[24] all involved constitutional challenges to restrictions on federal court jurisdiction in immigration cases.

As one who believes that there are significant constitutional limits on Congress's ability to restrict federal court jurisdiction, I am troubled that the issue is presented to the Court in the area of immigration law. There is a long history of judicial deference to

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16. *Id.* at 941 (quoting 8 U.S.C. § 1252(g) (Supp. III 1994)).
17. *See id.* at 945.
18. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); *see also* Harisiades v. Shaughnessy, 342 U.S. 580 (1952).
19. Hart, *supra* note 1, at 1389.
20. *See id.* at 1387-1402.
21. 481 U.S. 828 (1987).
22. 498 U.S. 479 (1991).
23. 509 U.S. 43 (1993).
24. 119 S. Ct. 936 (1999).

Congress in matters of immigration. The "plenary powers" doctrine provides for an "extremely deferential standard that courts will apply in considering the constitutionality of government conduct in this area."[25] I worry that the Court's desire to defer to Congress in matters of immigration law might lead to a decision that accords Congress broad authority to restrict federal court jurisdiction.

My goal in this Essay is to describe the general principles that should guide analysis of the constitutionality of jurisdiction restrictions in the immigration law area and elsewhere. I do not seek to provide a detailed analysis of the constitutionality of the recently adopted immigration laws. Others, such as Professors Gerald Neuman and Lenni B. Benson, have done a superb job of this already.[26] Rather, this Essay is an attempt by a federal courts professor to explain the murky and confused law concerning jurisdiction stripping.

I suggest that the law should be understood in light of the following four principles. I will attempt to be explicit about where the law is clear and where I am offering my own opinion and normative analysis.

1. *Unless federal statutes completely preclude all federal jurisdiction, Congressional restrictions on jurisdiction likely will be upheld.*

The Supreme Court has clearly indicated that Congress has authority to limit the jurisdiction of the Supreme Court and of lower federal courts. It has upheld jurisdiction-stripping laws in the past; however, none of these laws involved the complete preclusion of all federal court review. Hence, based on these cases, it seems accurate to say that unless federal statutes completely preclude all federal jurisdiction, congressional restrictions on jurisdiction likely will be upheld.

As to congressional restrictions on Supreme Court jurisdiction, Article III, Section 2, states: "[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions,

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25. Benson, *supra* note 7, at 1413 n.6.

26. *See* Benson, *supra* note 7; Gerald L. Neuman, *Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium*, 29 CONN. L. REV. 1395 (1997); *see also* Note, *supra* note 7.

and under such Regulations as the Congress shall make."[27] Indeed, the first Congress did not vest the Supreme Court with appellate jurisdiction over all types of cases and controversies enumerated in Article III. For example, under the Judiciary Act of 1789, the Supreme Court had authority only to review decisions of a state's highest court that ruled against a federal constitutional claim.[28] It was not until the twentieth century that the Supreme Court was accorded power to review decisions of a state court that ruled in favor of a constitutional right.[29]

In fact, the Supreme Court has upheld federal laws restricting jurisdiction, but none of these cases involved complete preclusion of all Supreme Court review. *Ex parte McCardle*[30] is a key ruling in this regard. McCardle was a newspaper editor in Vicksburg, Mississippi, who was arrested by federal officials for writing a series of newspaper articles that were highly critical of Reconstruction and especially of the military rule of the South following the Civil War.[31] McCardle filed a petition for a writ of habeas corpus pursuant to a statute adopted in 1867 that permitted federal courts to grant habeas corpus relief to anyone held in custody in violation of the Constitution or laws of the United States by either a state government or the federal government. Under the 1867 law, the Supreme Court was empowered to hear appeals from lower federal courts in habeas corpus cases. Before 1867, under the Judiciary Act of 1789, which was supplemented but not replaced by the 1867 law, federal courts could hear habeas petitions only of those who were held in federal custody.[32]

McCardle contended that the Military Reconstruction Act was unconstitutional in that it provided for military trials for civilians. He

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27 U.S. CONST. art. III, § 2, cl. 2.

28. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789); *see also* PETER W. LOW & JOHN CALVIN JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 173 (3d ed. 1994).

29. *See* Act of Dec. 23, 1914, 38 Stat. 790 (1914).

30. 74 U.S. (7 Wall.) 506 (1869). For an excellent discussion of this case, see William W. Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229 (1973).

31. Among other things, McCardle urged whites to boycott elections of officials for state constitutional conventions. He offered one dollar for the name of each white person who voted, with the names to be published in his newspaper. *See* Van Alstyne, *supra* note 30, at 236 n.42.

32. *See Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325 (1867).

also claimed that his prosecution violated specific Bill of Rights provisions, including the First, Fifth, and Sixth Amendments. The United States government argued that the federal courts lacked jurisdiction to grant habeas corpus to McCardle under the 1867 Act. The federal government read the 1867 statute, despite its language to the contrary, as providing federal court relief only for state prisoners. The Supreme Court rejected this contention and set the case for argument on the merits of McCardle's claim that the Military Reconstruction Act and his prosecution were unconstitutional.[33]

On March 9, 1868, the Supreme Court held oral arguments on McCardle's constitutional claims. Three days later, on March 12, 1868, Congress adopted a rider to an inconsequential tax bill that repealed that part of the 1867 statute that authorized Supreme Court appellate review of writs of habeas corpus. Members of Congress stated that their purpose was to remove the *McCardle* case from the Supreme Court's docket and thus prevent the Court from potentially invalidating Reconstruction. Representative Wilson declared that the "amendment [repealing Supreme Court authority under the 1867 Act is] aimed at 'striking at a branch of the jurisdiction of the Supreme Court . . . thereby sweeping the [*McCardle*] case from the docket by taking away the jurisdiction of the [C]ourt.'"[34]

On March 25, 1868, President Andrew Johnson vetoed the attempted repeal of Supreme Court jurisdiction.[35] President Johnson declared: "'I cannot give my assent to a measure which proposes to deprive any person restrained of his or her liberty in violation of the Constitution, . . . from the right of appeal to the highest judicial authority known to our government.'"[36] Congress immediately overrode President Johnson's veto on March 27, 1868.

The Supreme Court then considered whether it had jurisdiction to hear McCardle's constitutional claims in light of the recently adopted statute denying it authority to hear appeals under the 1867

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33. *See id.* at 327.

34. Van Alstyne, *supra* note 30, at 239 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868)).

35. *See id.* It should be noted that this was five days before the Senate was scheduled to begin its impeachment trial of President Johnson and that the grounds for impeachment focused solely on his alleged obstruction of Reconstruction. *See id.*

36. *Id.* at 239-40 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062, 2165 (1868)).

Act, which was the basis for jurisdiction in McCardle's petition. The Court held that it lacked power to decide McCardle's case because of Congress's authority to create exceptions and regulations to the Court's appellate jurisdiction.[37]

Chief Justice Chase, writing for the Court, began by noting that the "first question necessarily is that of jurisdiction," and that if the 1868 Act repealed the Court's authority under the 1867 statute, the case had to be dismissed for want of jurisdiction.[38] Chief Justice Chase then observed that, although the Court's authority stems from the Constitution, it "is conferred 'with such Exceptions and under such Regulations as Congress shall make.'"[39] The Court concluded that the 1868 Act was an unmistakable exception to the Court's appellate jurisdiction, thus mandating the dismissal of McCardle's appeal. The Court stated: "The provision of the [A]ct of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception."[40] Accordingly, the Court dismissed the case for lack of jurisdiction.

However, in *McCardle*, even after the repeal of the 1867 Act, the Supreme Court still had authority to hear McCardle's claims under the 1789 Judiciary Act, which allowed federal courts to grant writs of habeas corpus to federal prisoners. In other words, in *McCardle*, the Supreme Court was considering the constitutionality of a statute that did not completely preclude Supreme Court review, but rather only eliminated one of two bases for its authority. The *McCardle* Court expressly indicated that it still had jurisdiction in habeas corpus cases, notwithstanding the repeal of the 1867 Act. The Court, at the conclusion of its opinion, declared:

> Counsel seem to have supposed, if effect be given to the

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37. *See McCardle*, 74 U.S. at 513.

38. *Id.* at 512.

39. *Id.* at 513 (quoting U.S. CONST. art. III, § 2, cl. 2). Although Supreme Court jurisdiction is self-executing, the Court has always acted as if Congress confers jurisdiction on it. In *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), the Court stated: "The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject." *Id.* at 314.

40. *McCardle*, 74 U.S. at 514.

> repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[41]

Much more recently, in *Felker v. Turpin*,[42] the Court upheld a federal law that precluded Supreme Court review of some habeas corpus petitions. Title I of the 1996 Antiterrorism and Effective Death Penalty Act prohibits state prisoners from bringing successive habeas corpus petitions unless approval is received from a United States court of appeals.[43] The law precludes United States Supreme Court review, by appeal or writ of certiorari, of any decision by a court of appeals granting or denying authorization for a state prisoner to file a successive habeas corpus petition.[44]

In *Felker*, the Supreme Court unanimously upheld the constitutionality of this jurisdictional restriction.[45] Chief Justice Rehnquist, writing for the Court, emphasized that the law did not preclude *all* Supreme Court review of petitions from individuals denied the ability to file successive ones; the law did not repeal the Court's authority to entertain original habeas petitions.[46] The Court explained: "But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, Section 2."[47]

The Supreme Court, however, has not granted an original habeas petition since 1925. *Felker* seems to stand for the proposition that any continuing basis for Supreme Court review, no matter how unlikely, is sufficient to make a restriction on jurisdiction constitu-

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41. *Id.* at 515.
42. 518 U.S. 651 (1996).
43. *See* Pub. L. No. 104-132, 110 Stat. 1214, § 106(b) (1996).
44. *See id.* § 106(b)(3)(E).
45. *See Felker*, 518 U.S. at 654.
46. *See id.* at 658.
47. *Id.* at 661-62.

tional.[48]

Likewise, the Supreme Court has upheld the constitutionality of restrictions on lower federal court jurisdiction but always in situations where Supreme Court review remained. None of the cases involved complete preclusion of all federal court review. These cases hold that Congress has authority to determine the jurisdiction of the federal courts because Congress has discretion as to whether to establish such tribunals.[49] Article III, Section 1, provides that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[50] Therefore, in light of this literal language, Congress need not create lower federal courts at all. Because Congress need not even establish such courts, Congress can create them with whatever jurisdiction it desires. But never has the Court extended this reasoning to a situation where there is complete preclusion of all federal court jurisdiction.

For example, in the earliest case on the issue, *Sheldon v. Sill*,[51] the Court upheld a provision of the Judiciary Act of 1789 that prohibited diversity jurisdiction from being created by the assignment of a debt.[52] Under this principle, when there has been an assignment, a federal court may take the case under its diversity jurisdiction only if the case properly could have been brought to federal court prior to the assignment. Article III, which authorizes diversity jurisdiction, creates no such limitation precluding jurisdiction based on assignment.

The issue in *Sheldon v. Sill* was whether Congress could restrict diversity jurisdiction in this manner. Sheldon, a Michigan resident, owed money to Hastings, also a Michigan resident, on a bond and a mortgage. Hastings assigned the debt owed him to Sill, a New York

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48. In a concurring opinion, Justice Stevens suggested that there might be other ways for the Supreme Court to review courts of appeals' decisions, such as through writs other than certiorari pursuant to the All Writs Act, 28 U.S.C. § 1651 (1994). *See id.* at 666 (Stevens, J., concurring). Justice Stevens, however, gave no examples of what these writs might be.

49. *See, e.g.*, Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 960-62 (1982).

50. U.S. CONST. art III, § 1.

51. 49 U.S. (8 How.) 441 (1850).

52. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (1789).

resident. Pursuant to this assignment, Sill sued Sheldon in federal court to recover the sum due. Sheldon moved to dismiss because, under the Judiciary Act of 1789, federal courts could not hear cases where diversity was created by an assignment. But Sill contended that because Article III authorizes diversity jurisdiction and does not contain a limitation for diversity gained by assignment, this section of the Judiciary Act was unconstitutional.[53]

The Supreme Court upheld the Judiciary Act's restriction on diversity jurisdiction. The Court declared: "Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."[54] The Court continued in even broader language: "The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant."[55]

The Supreme Court has adopted this position in a number of other decisions. In *Kline v. Burke Construction Co.*,[56] the Supreme Court held that the Anti-Injunction Act precluded a federal court from enjoining a simultaneous state court proceeding for breach of contract. In upholding this limit on federal court power, the Court stated:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.[57]

In *Lauf v. E. G. Shinner & Co.*,[58] the Court considered the

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53. *See Sheldon*, 49 U.S. at 446-47.
54. *Id.* at 449.
55. *Id.* (citations omitted).
56. 260 U.S. 226 (1922).
57. *Id.* at 234 (citations omitted).
58. 303 U.S. 323 (1938).

constitutionality of the Norris-LaGuardia Act, which limited the ability of the federal courts to issue injunctions in labor disputes and prevented federal courts from enforcing contracts whereby employees agreed not to join a union. During the first decades of the twentieth century, the federal courts were hostile to the labor movement and often enjoined labor protests. Moreover, the Supreme Court held that states could not prohibit employers from requiring employees to agree to refrain from joining a union as a condition of employment.[59] The Norris-LaGuardia Act sought to protect labor by limiting the power of the federal courts.

In *Lauf*, an employer sought an injunction to prevent an unincorporated labor union from picketing an employer who refused to require employees to join the union. The federal district court ruled in favor of the employer and issued the injunction. The Supreme Court reversed, holding that the Norris-LaGuardia Act restricted the district court's authority to hear the matter or issue the remedy. The Court found the constitutional issue untroubling. Justice Roberts, writing for the Court, declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[60]

However, in *Sheldon*, *Kline*, and *Lauf*, the Supreme Court's jurisdiction was untouched. None involved the complete preclusion of all federal court review. Together, all of the cases indicate that, unless federal statutes completely preclude all federal jurisdiction, Congressional restrictions on jurisdiction will likely be upheld.

2. *The Supreme Court will do everything possible to interpret statutes to avoid their precluding all judicial review.*

On many occasions, the Supreme Court has narrowly construed federal statutes that appeared to preclude all judicial review. Indeed, the Court has spoken of the strong presumption in favor of judicial review and the need to interpret statutes, whenever possible, to preserve its availability.

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59. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

60. *Lauf*, 303 U.S. at 330.

For example, in *Johnson v. Robison*,[61] the Court refused to interpret a statute limiting review of Veterans' Administration decisions in a manner that would have foreclosed all judicial review. Robison, a conscientious objector who had performed alternative service, challenged a federal statute that provided educational benefits to veterans but excluded conscientious objectors. A federal law appeared to preclude federal court review of Robison's claim. The statute provided:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.[62]

The Court observed that there would be "serious questions" about the constitutionality of this provision if it precluded all review.[63] The Court, however, narrowly interpreted the statute and stated that it did not apply in this case because this was not an objection to a decision made by the Veterans' Administration, but instead a challenge to a statute adopted by Congress. The Court noted that the purposes for the limit on judicial review—deference to the agency in awarding benefits—would not be undermined by allowing jurisdiction to hear challenges to the statute.[64]

Similarly, in *Oestereich v. Selective Service System Local Board No. 11*,[65] the Court narrowly interpreted a provision limiting review of Selective Service decisions. During the 1960s, the Selective Service Commission retaliated against students involved in anti-Vietnam War protests by revoking their student deferments and classifying them as ready for induction. After the federal courts held that this revocation was impermissible and enjoined the Selective

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61. 415 U.S. 361 (1974); *see also* Webster v. Doe, 486 U.S. 592 (1988) (refusing to find statute to preclude review of a claim by an employee of the CIA, who alleged that he was fired because he was a homosexual).

62. 38 U.S.C. § 211(a) (1982) (repealed 1991).

63. *Johnson*, 415 U.S. at 366.

64. *See id.* at 373-74.

65. 393 U.S. 233 (1968).

Service Commission, Congress responded by adopting a statute limiting judicial review. The Act provided that "[n]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction."[66] The statute appeared to limit challenges to its validity to two contexts: defenses to a criminal prosecution and habeas corpus.

Oestereich was a full-time student at a theological school preparing for the ministry and was, therefore, entitled to a draft exemption under federal statutes. But after he participated in an anti-war protest, he was reclassified I-A, ready for induction. Despite the federal statute appearing to preclude jurisdiction, the Court held that Oestereich could bring a suit challenging the legality of his reclassification. The Court held that the law limiting judicial review was not meant to apply to a clearly lawless action by a draft board.[67] Justice Harlan, in a concurring opinion, stated that "[i]t is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims."[68]

Many of these cases involving narrow construction of laws that appeared to preclude judicial review have been in the immigration law context. In *United States v. Mendoza-Lopez*,[69] the Court held that an alien who is prosecuted for illegal entry following deportation may assert in the constitutional proceeding the invalidity of the underlying administrative deportation order. In narrowly construing statutes that appeared to preclude judicial review, the Court declared: "[W]here the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to conclusively establish an element of a criminal offense."[70]

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66. Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (1967) (codified at 50 U.S.C. § 460(b)(3) (1994)).

67. *See Oestereich*, 393 U.S. at 237.

68. *Id.* at 243 n.6 (citations omitted) (Harlan, J., concurring).

69. 481 U.S. 828, 837-39 (1987).

70. *Id.* at 838.

In *McNary v. Haitian Refugee Center, Inc.*,[71] the Supreme Court interpreted a federal statute to avoid finding that it precluded judicial review. The Immigration Reform and Control Act of 1986 created a special amnesty program for specified alien farmworkers and barred judicial review of "a determination respecting an application," except in the federal court of appeals as part of judicial review of a deportation order.[72] The Supreme Court declared that there is a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action."[73] The Court noted that it assumed that Congress was aware of this presumption; therefore, "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review."[74] Hence, the Court concluded that the statute should be interpreted as not precluding judicial review.

Likewise, in *Reno v. Catholic Social Services*,[75] the Court refused to find a preclusion of jurisdiction in INS regulations implementing the legalization program for illegal immigrants under the Immigration Reform and Control Act. The Court explained that to find preclusion of review, it "would have to impute to Congress an intent to preclude judicial review of the legality of [the] INS action entirely under those circumstances."[76] The Court noted that there is a "'well-settled presumption'"[77] in favor of interpreting statutes to allow judicial review and that it "will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'"[78]

Finally, most recently, in *Reno v. American-Arab Anti-Discrimination Committee*,[79] the Court upheld a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that prohibited federal courts from reviewing the "decision or action" of the Attorney General to "commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act" "[e]xcept as

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71. 498 U.S. 479, 492 (1991).
72. 8 U.S.C. § 1160(e) (1994); *see also McNary*, 498 U.S. at 491-92.
73. *McNary*, 498 U.S. at 496.
74. *Id.*
75. 509 U.S. 43 (1993).
76. *Id.* at 63.
77. *Id.* at 63-64 (quoting *McNary*, 498 U.S. at 496).
78. *Id.* at 64 (quoting Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967)).
79. 119 S. Ct. 936 (1999).

provided in this section."[80]

The case has a long procedural history. In 1987, the Immigration and Naturalization Service instituted deportation proceedings against eight individuals alleged to belong to the Popular Front for the Liberation of Palestine. The INS characterized the group as an international terrorist and communist organization.[81] The INS charged all eight under the McCarren-Walter Act,[82] which was subsequently repealed,[83] and provided at the time for the deportation of aliens who "'advocate... world communism.'"[84] Additionally, six of the individuals were charged with being here illegally because they had overstayed visas and failed to maintain student status.[85]

The eight individuals filed suit in the United States District Court for the Central District of California challenging the constitutionality of the McCarren-Walter Act and alleging that they were impermissibly singled out for selective prosecution because of their constitutionally protected speech activities.[86] Ultimately, with many procedural steps, consistent victories by the plaintiffs, and several trips back and forth between the district court and the Ninth Circuit, the plaintiffs won a preliminary injunction in the district court.[87] While the government's appeal was pending in the Ninth Circuit, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRRIRA) was adopted.[88]

The IRRIRA significantly restricts the ability of courts to hear challenges to the legality of deportation proceedings. Simply put, the Attorney General interpreted this section as precluding any judicial review of deportation orders, except in the context of a challenge to a final order of deportation.[89] The Supreme Court accepted this

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80. 8 U.S.C. § 1252(g) (1999).
81. *See Reno*, 119 S. Ct. at 938.
82. 8 U.S.C. § 1101 *et seq.* (1952).
83. *See Reno*, 119 S. Ct. at 939 n.2.
84. *Id.* at 938 (quoting 8 U.S.C. § 1251(a)(6)(D), (G)(v), (H) (1982)).
85. *See id.* at 939.
86. *See id.*
87. *See id.*
88. *See id.* at 940.
89. *See id.* at 941.

interpretation and upheld the provision.[90]

Although the Court's decision can be criticized for interpreting the statute to restrict judicial review, the law was not understood as foreclosing all possibilities for federal court oversight of deportation proceedings. Rather, the Court saw the law as barring judicial review of the Attorney General's decision to initiate deportation proceedings. Federal courts still would be available to hear challenges to final orders of deportation.[91]

Together, all of these cases indicate that the Supreme Court will do everything possible to interpret statutes to avoid their precluding all judicial review. Professor Benson has made a compelling argument that the recent restrictions on review in deportation cases are not a preclusion of all federal court jurisdiction because of the remaining availability of habeas corpus relief.[92]

3. *If a statute is interpreted as precluding all federal judicial review, its constitutionality is uncertain.*

There simply never has been a Supreme Court decision construing a statute to preclude all federal court review. As described above, the Supreme Court has always construed statutes to leave open some option for federal jurisdiction and has upheld laws that *partially* restrict jurisdiction.

There have been a few lower federal court cases concerning statutes interpreted as barring all federal court review. In *Battaglia v. General Motors Corp.*,[93] the United States Court of Appeals for the Second Circuit considered a federal statute that precluded all judicial review. Prior to enactment of the statute, the Supreme Court had held that employees were allowed to consider as part of their workweek time spent walking to and from their workstations.[94] Congress

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90. *See id.* at 945. The Court also held that undocumented aliens cannot bring claims for selective prosecution. *See id.* at 946-47.

91. *See id.* at 943.

92. *See* Benson, *supra* note 7, at 1416, 1465-78.

93. 169 F.2d 254 (2d Cir. 1948).

94. *See* Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123, 321 U.S. 590 (1944).

responded by adopting a statute, the Portal-to-Portal Act,[95] specifying that time spent on such activities did not count as part of the work-week. Moreover, the Act provided that "[n]o court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction . . . to enforce liability or impose punishment" for failure of the employer to pay for work time spent on such activities.[96]

The Second Circuit indicated that Congress could not restrict jurisdiction in a manner that prevented all courts from hearing claims. The court explained that

> while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[97]

Also, in *Eisentrager v. Forrestal*,[98] the United States Court of Appeals for the District of Columbia Circuit considered a habeas corpus petition from an individual who was imprisoned by United States military authorities in Germany. The federal habeas corpus statute, as then interpreted, provided that a federal court could grant habeas relief only to prisoners held within the jurisdiction of the court.[99] Therefore, no federal court had jurisdiction to hear Eisentrager's claim that he was held in custody in violation of the United States Constitution. No state court could hear his habeas petition because of the Supreme Court's decision in *Tarble's Case*,[100] which prevented state courts from granting habeas to federal prisoners. The Supreme Court lacked original jurisdiction and could not hear the matter on appeal because there was no lower court from which an appeal could be taken.

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95. Portal-to-Portal Act of 1947, ch. 52, § 1, 61 Stat. 84 (current version at 29 U.S.C. § 251 (1994 & Supp. I 1995)).

96. 29 U.S.C. § 252(d).

97. *Battaglia*, 169 F.2d at 257.

98. 174 F.2d 961 (D.C. Cir. 1949).

99. *See* Ahrens v. Clark, 335 U.S. 188 (1948). *But see* Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484 (1973).

100. 80 U.S. (13 Wall.) 397 (1871).

The District of Columbia Circuit found the complete preclusion of jurisdiction to be unconstitutional and heard the case. The court said that because a state court cannot inquire into the validity of federal custody, federal jurisdiction must exist; otherwise, the government's action would be completely unreviewable.[101]

4. *The complete preclusion of jurisdiction in immigration matters should be deemed unconstitutional; the Supreme Court should recognize a constitutional right to a judicial forum.*

The prior three points were descriptive; this final one is normative. Frequently, scholars appraising the constitutionality of jurisdictional restrictions approach them from two perspectives: separation of powers and due process. However, I think that it is a mistake to see these two constitutional arguments as distinct rather than interrelated. Why, and when, does Congress's curtailing of federal jurisdiction offend separation of powers? The clearest explanation was offered by Professor Hart almost a half century ago: "The exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[102] Other commentators as well have argued that Congress cannot use its power to interfere with the Court's essential functions under the Constitution.[103]

When does jurisdiction-stripping keep federal courts from performing their essential functions? One key way is when it prevents them from providing due process of law. Without a doubt, a central function of the federal judiciary is upholding the Constitution of the United States. Due process, of course, is at the very core of the judicial mission.

The complete preclusion of jurisdiction should be viewed as offending separation of powers and due process. First, providing independent and impartial decision making is a key characteristic of the federal judicial power and a core aspect of due process. Complete

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101. *See Tarble's Case*, 80 U.S. at 406.

102. Hart, *supra* note 1, at 1365.

103. *See, e.g.*, Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sager, *supra* note 2, at 37-42.

preclusion of federal jurisdiction offends both of these notions. In the immigration law context, foreclosing all federal judicial review leaves the matter entirely in the hands of administrative proceedings; state courts cannot review federal immigration proceedings or order relief against the federal government.[104]

An administrative proceeding is not an adequate substitute for a federal judicial proceeding. A federal administrative adjudicatory proceeding is essentially an Article I court. The Supreme Court has made it clear that Congress's ability to substitute an Article I tribunal for an Article III federal court is limited by the Constitution.[105] In *Commodity Futures Trading Commission v. Schor*,[106] the Court made it clear that Congress cannot create Article I courts in a manner that offends separation of powers and due process. In *Schor*, the Court acknowledged the benefits of an administrative alternative to federal court litigation in terms of efficiency and expertise.[107] At the same time, the Court said that these interests had to be balanced against "the purposes underlying the requirements of Article III."[108] The Court considered two goals of Article III: ensuring fairness to litigants by providing an independent judiciary and maintaining the "structural" role of the judiciary in the scheme of separation of powers.

As to separation of powers, the Court declared: "In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules."[109] Justice O'Connor, writing for the majority, said that, instead, the Court focused on several factors including:

> the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to

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104. *See Tarble's Case*, 80 U.S. at 397.
105. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
106. 478 U.S. 833 (1986).
107. *See id.* at 855-56.
108. *Id.* at 847.
109. *Id.* at 851.

> which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[110]

The complete preclusion of federal jurisdiction over immigration matters—such as reviewing deportation proceedings—would offend these criteria. First, the Article I court, the administrative adjudication, would be performing a function traditionally carried out by the federal courts: having the final say over a legal matter. Additionally, the rights adjudicated are enormously important, especially in the immigration law context. Therefore, the complete preclusion of federal court jurisdiction should be deemed unconstitutional because of the loss of the independence and impartiality of the federal judicial forum.

Second, and undoubtedly interrelated, from the perspective of a traditional due process analysis, the complete preclusion of federal court jurisdiction should be deemed unconstitutional. In *Mathews v. Eldridge*,[111] the Court articulated a balancing test for deciding what procedures are required when there has been a deprivation of life, liberty, or property and due process is required. The Court in *Mathews* articulated three factors that should be balanced:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[112]

From all of these perspectives, the complete preclusion of a federal judicial forum should be regarded as a denial of due process. As to the first factor, the interest in remaining in the United States is

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110. *Id.*
111. 424 U.S. 319 (1976).
112. *Id.* at 335.

enormously important to the individual. Regarding the second consideration, there is a great risk of erroneous deprivation if there is no opportunity for judicial review of administrative decisions. Indeed, the risk would likely grow if the administrative decision maker knew that there was no possibility of reversal by a federal court. Finally, with regard to the burden, federal courts traditionally have handled review of deportation and other immigration matters. There is no indication that this has placed an undue burden on the judiciary. Thus, the complete preclusion of federal judicial review should be deemed a denial of due process.

CONCLUSION

The ability of Congress to restrict federal court jurisdiction raises basic constitutional issues in terms of separation of powers, federalism, and due process. This, of course, is why the topic has engendered so much scholarly attention for a half century. Now, after so much debate, the Supreme Court seems poised to deal with the issue.

The matter comes before the Court in the context of immigration law, an area where there traditionally has been great judicial deference to Congress. It comes before the Court involving individuals—allegedly deportable individuals—who have the least political power and influence in our society. Yet, it is especially for them that the availability of federal judicial protection is essential.

This essay has not attempted to analyze the constitutionality of the recent federal laws restricting jurisdiction over immigration cases. Rather, I have sought to offer a framework for analyzing the constitutionality of federal laws restricting federal court jurisdiction. In this Essay, I have both described the current law and defended the conclusion that the complete preclusion of federal court review is unconstitutional.